# STATE OF MICHIGAN

# COURT OF APPEALS

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FEI COMPANY, f/k/a U.S. CONVEYOR, INC., a/k/a FABRICATING ENGINEERS COMPANY,

Plaintiff-Appellant/Cross-Appellee,

v

REPUBLIC BANK, S.E.,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
August 10, 2006

No. 268700
Macomb Circuit Court
LC No. 2005-004891-CK

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Before: Davis, P.J., and Cooper and Borrello, JJ.

PER CURIAM.

Plaintiff FEI Company appeals as of right an order of dismissal granting summary disposition to defendant Republic Bank, S.E. Defendant cross-appeals as of right the same order. We affirm in part and remand for a ruling on the issue of sanctions.

This case arose out of a dispute between the parties over mortgages that they held on certain properties located in Oakland and Genesee counties, owned by John C. and Sue Cooper. Defendant informed plaintiff of its intention to hold foreclosure sales, and it then adjourned the sales several times. Plaintiff requested a meeting with defendant. Plaintiff contends that at a meeting on February 7, 2005, defendant's representatives promised to give plaintiff and Cooper "an opportunity to complete the sale of the Properties, and to provide a timeline within which [they] could market and sell the properties before the sheriff's sales." In return, plaintiff allegedly orally promised "to seek and find buyers for the Properties." No writing was made memorializing the oral promise defendant allegedly made to delay foreclosure. The foreclosure sales took place on March 1 and 2, 2005.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Under MCR 2.116(C)(7), where the claim is allegedly barred, the trial court must accept as true the contents of the complaint, unless they are contradicted by documentary evidence submitted by the moving party. *Id*., 119. When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact, although "the mere possibility that the

claim might be supported by evidence produced at trial" is insufficient. *Id*., 120-121. We also review de novo questions of statutory construction, with the fundamental goal of giving effect to the intent of the Legislature. *Weakland v Toledo Engineering Co, Inc*, 467 Mich 344, 347; 656 NW2d 175, amended on other grounds 468 Mich 1216 (2003).

Plaintiff first argues that the trial court erred in granting summary disposition to defendant under the statute of frauds applicable to financial institutions, MCL 566.132(2). Plaintiff argues that part performance by the parties removed the claims from the statute of frauds. We disagree.

MCL 566.132 provides, in pertinent part:

> (2) An action shall not be brought against a financial institution to enforce any of the following promises or commitments of the financial institution unless the promise or commitment is in writing and signed with an authorized signature by the financial institution:
>
> (a) A promise or commitment to lend money, grant or extend credit, or make any other financial accommodation.
>
> (b) A promise or commitment to renew, extend, modify, or permit a delay in repayment or performance of a loan, extension of credit, or other financial accommodation.
>
> (c) A promise or commitment to waive a provision of a loan, extension of credit, or other financial accommodation.

"The statute of frauds exists for the purpose of preventing fraud or the opportunity for fraud, and not as an instrumentality to be used in the aid of fraud or prevention of justice." *Lakeside Oakland Dev, LC v H & J Beef Co*, 249 Mich App 517, 526; 644 NW2d 765 (2002) (citation omitted). MCL 566.132(2) contains "an unqualified and broad ban" thereby "eliminating the possibility of creative pleading to avoid the ban." *Crown Technology Park v D&N Bank*, 242 Mich App 538, 550-551; 619 NW2d 66 (2000).

We first consider whether the verbal agreement allegedly made at the February 7, 2005 meeting falls within the ambit of MCL 566.132(2). The statute does not define "financial accommodation," but plaintiff admits that it was an "accommodation." According to *Random House Webster's College Dictionary* (1997), "financial" means "of or pertaining to those commonly engaged in dealing with money and credit." An agreement to delay a sheriff's foreclosure sale constitutes an accommodation pertaining to those engaged in dealing with money and credit, because a delay in a foreclosure sale is an accommodation that would be made by a lender or creditor. Therefore, an agreement to delay a foreclosure sale is an agreement to make a "financial accommodation" within the scope of MCL 566.132(2)(a).

Plaintiff then contends that part performance removes the alleged oral agreement from the statute of frauds. We decline to address whether part performance *would* have this effect as a matter of law, because no part performance took place here. Plaintiff argues that defendant's adjournment of the sheriff's sales after the alleged verbal agreement was partial performance of

the agreement. However, defendant had been adjourning the sheriff's sales for several weeks before the meeting. There is no evidence that the adjournments following the meeting were anything other than a continuation of the prior adjournments. Plaintiff also argues that it endeavored to locate buyers, in partial performance of its side of the agreement, but no evidence supports this contention. Plaintiff argues that Cooper continued to pay defendant, but Cooper is not a party to this action, and he was a borrower from defendant under a preexisting duty to pay defendant. *Yerkovich v AAA*, 461 Mich 732, 740-741; 610 NW2d 542 (2000) (doing what one is legally bound to do is not consideration for a new promise). There was no part performance that removed plaintiff's claims from the statute of frauds.

Plaintiff next argues that its promissory estoppel claim is not barred by MCL 566.132(2). We disagree. MCL 566.132(2) contains "an unqualified and broad ban" thereby "eliminating the possibility of creative pleading to avoid the ban." *Crown Technology Park v D&N Bank*, 242 Mich App 538, 550-551; 619 NW2d 66 (2000). Claims of negligence and promissory estoppel against a financial institution are among those barred. *Id*., 540, 550. The trial court did not err in granting summary disposition to defendant under MCR 2.116(C)(7).

Based on our analysis of the above issues, we need not address plaintiff's final argument regarding venue. Venue is not jurisdictional because it can be waived. MCR 2.221(C). Moreover, the parties agree that venue is an alternative argument defendant raised below only in the event that the trial court or this Court should decide that MCL 566.132(2)(a) does not bar plaintiff's claim. Because we find that MCL 566.132(2) does bar plaintiff's claim, defendant impliedly concedes its challenge to venue, rendering plaintiff's argument that venue was proper in Macomb County moot. We therefore decline to address the issue. *Ewing v Bolden*, 194 Mich App 95, 104; 486 NW2d 96 (1992).

Defendant argues on cross-appeal that the trial court clearly erred in failing to grant sanctions under MCL 600.2591 and MCR 2.114(D). The trial court did not decide this issue. Appellate review is normally limited to issues decided by the trial court. *Candelaria v B C Gen Contractors, Inc*, 236 Mich App 67, 83; 600 NW2d 348 (1999). We "*may* consider an issue not decided by the lower court if it involves a question of law and the facts necessary for its resolution have been presented." *Michigan Twp Participating Plan v Fed Ins Co*, 233 Mich App 422, 435-436; 592 NW2d 760 (1999) (emphasis added). We decline to do so here. Because the issue involves a fact-related inquiry into whether the claims were well grounded in fact,[1] the trial court should address the issue first.

Affirmed in part and remanded for a ruling in the question of sanctions. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ Jessica R. Cooper
/s/ Stephen L. Borrello

[1] MCL 2.114(D)(2).